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A

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See PAYMENTS.

1. *Note.*—The taking a promissory note for an antecedent debt does not extinguish the obligation, unless the note be accepted in satisfaction.—Citizens' Bank, &c., v. Carson, 191.
2. *Account Current—Balance.*—A banker is not required by law to apply a balance due by him on account current to his depositor to the payment of a liability from his customer to himself upon a bill or note. In a suit by the banker against the acceptor of a bill, the fact that the drawer had an account with the banker, and that after protest of the bill there were balances in favor of the drawer, would not be evidence in favor of the acceptor to show a payment or satisfaction by the drawer.—*Id.*

ACCOUNT.

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1. *Appeal from approval of Sales.*—An appeal lies to the Circuit Court from a judgment of the County Court, approving the report of the administrator's proceedings in the sale of real estate, under the 6 s. d. of § 1, art. 8, of the administration act of 1835. (R. C., p. 63; Wilson v. Brown, 21 Mo. 410, affirmed.)—Wolff & Speck v. Wohlein, 124.
2. *Appeal—Proceedings.*—The proceedings in an appeal from the judgment of the County Court in 1857, approving an administrator's sale of real estate made under the R. C. of 1835, must be conducted in accordance with the statutes in force at the time the appeal is taken. (R. C. 1855, p. 1025, § 16.) —*Id.*
3. *Appeal—Final Judgment.*—A judgment of the Circuit Court upon an appeal from the County or Probate Court, refusing to approve the report of sale of the real estate made by the administrator, is not a final judgment from which an appeal lies to the Supreme Court. (R. C. 1835, p. 53, § 20.)—*Id.*
4. *Administrator—Title.*—Although the administrator or executor is entitled to the personal effects and choses in action of the decedent, he holds them only as trustee for the creditors and next of kin, and not for his own benefit; therefore the effects of the decedent cannot be seized by a judgment creditor of the administrator in payment of the debt of such administrator. Nor are the payees of a note given to the administrator for goods of the

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decedent sold by him, liable as garnishees to a judgment creditor as being debtors of such administrator. (The cases of Lecompte v. Sergeant, 7 Mo. 351, and Thomas v. Relfe, 9 Mo. 377, overruled.)—Lessing et al., v. Vertrees, et al., 431.

5. *Administrator's Deed.*—The deed of the administrator upon a sale of the land of a decedent under order of a Probate Court, does not pass any of the personal rights of the administrator to the land sold, but only the interest of the decedent.—Dickerson v. Campbell et al., 544.
6. *Administrator—Title.*—The administrator or executor is entitled to the possession of the personal property and choses in action of the deceased in preference to the next of kin. Where the administrator of an estate, upon final settlement, was ordered to pay to the parties entitled by law, and the intestate left two children, one of whom died pending the administration, upon whose estate letters were granted; *held*, that the personal representative of the deceased child was entitled to demand the portion of the estate in the hands of the first administrator, and that a payment of the whole balance to the surviving next of kin was no defence to a suit for the half of such balance.—Hanenkamp's Adm'r v. Borgmier, 569.

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ASSIGNMENT.

1. *Assignment of right of action.*—To give the grantee in the assignment of a lease a right of action upon the broken covenants of a prior assignee, the right of action upon the breaches of the covenant must be assigned. The verbal promise of the prior assignee to the subsequent assignee to pay the sum due for the breaches of the covenant would be void for want of a consideration between the parties.—Woodburn v. Renshaw, 197.
2. *Note.*—When a holder of a note secured by mortgage had prior to his bankruptcy endorsed the note to third parties as collateral security for the performance of conditions, and the endorsees subsequent to the bankruptcy transferred the notes without endorsement to the plaintiff's intestate; *held*, that the plaintiff, having the legal title, had the right to enforce collection of the note and the foreclosure of the mortgage, and that the liability of the plaintiff to account to the assignee in bankruptcy did not affect the right of the plaintiff.—Overall, Adm'r, v. Ellis, 322.
3. *Conflict of Laws—Sale—Insolvent.*—The bankrupt and insolvent laws of each State or nation bind and affect their own citizens, and as against them will be enforced by the courts of other States when questions arise as to the title conveyed under such laws. Therefore, where plaintiffs and defendants were citizens of Louisiana, and the defendants had made an assignment of their property in accordance with the laws of that State for the benefit of their creditors, and a syndic or assignee had been appointed to collect and distribute the assets of the insolvents, one of the creditors, a citizen of, and residing in that State, cannot secure a preference over the remaining creditors in his own State by process of attachment against the the property and assets of the insolvents in this State. As against such attachment, the title of the assignee of the insolvents will prevail.—Einer v. Beste & Deynood, 240.

ATTACHMENT.

1. *Absconding.*—The actual absconding of a party from his usual place of abode, and taking up an abode in another State, supports an attachment upon the ground that the party has absconded, or absented himself from his usual place of abode, under s. d. 4, § 1, of the Attachment Act, R. C. 1855, p. 238.—Ross v. Clark, 296.
2. *Absconding—Evidence.*—The fraudulently disposing of his goods in a clandestine manner, is evidence against a party against whom an attachment issues on the ground that the defendant has absconded, for the purpose of showing the intent of the absence.—*Id.*
3. *Levy—Execution Sale.*—When a tract of land has been laid out into blocks and lots, with streets and alleys dedicated to the public use, and some of the lots have been sold to third parties, an attachment subsequently levied upon the tract, by its description before subdivision, will be a nullity; and an execution sale, under the judgment in the attachment suit, will not convey the title.—Henry v. Mitchell, 512.
4. *Levy—Description—Deed.*—The sheriff's return of the levy of an attachment upon land of the defendant should describe the land with as much certainty as a sheriff's deed.—*Id.*
5. *Garnishment, return.*—The return day of a garnishment on execution from a justice of the peace, is the next law day of the justice, and not the return day of the execution. (R. C. 1855, p. 965, § 11.)—Wise v. Wolff, 209.
6. *Administrator—Debtor.*—Although the administrator or executor is entitled to the personal effects and choses in action of the decedent, he holds them only as trustee for the creditors and next of kin, and not for his own benefit; therefore, the effects of the decedent cannot be seized by a judgment creditor of the administrator in payment of the debt of such administrator. Nor are the payees of a note given to the administrator for goods of the decedent sold by him, liable as garnishees to a judgment creditor as being debtors of such administrator. (The cases of Lecompte v. Sergeant, 7 Mo. 351, and Thomas v. Relfe, 9 Mo. 377, overruled.)—Lessing et al. v. Vertrees et al., 431.
7. *Practice.*—The defence by a garnishee that the assets of a judgment debtor have been transferred by his conviction for crime, and being sentenced to the penitentiary, if a defence at all, cannot be brought forward by a motion to dismiss; it should be presented by plea.—Wise v. Wolff, 209.

B

BAILMENT.

1. *Carriers.*—The undertaking of a common carrier to transport goods to a particular destination necessarily includes the duty to deliver them in safety. The delivery must be made or tendered in proper time and manner and at a proper place, and *prima facie* to the consignee personally.—Bartlett v. Steamboat Philadelphia, 256.
2. *Negligence.*—In an action to recover for the pasturing of cattle, some of which were not returned by the bailee, it is incumbent upon the plaintiff to prove that he used the degree of diligence required of him by his contract. The degree of diligence required depends upon the terms of the contract.—Goodfellow's Exec'r v. Meegan, 280.

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3. *Forwarder.*—It is the duty of a forwarding merchant to advise his consignee of the shipment made to his address, and the failure of the carrier to deliver the goods shipped in accordance with the bill of lading will not discharge him of liability.—Railey v. Porter. 471.
4. *Loan.*—Where money was deposited by plaintiff with defendants as a special deposit, and the parties subsequently agreed that the plaintiff should lend and the defendants borrow the money, the loan was complete if nothing remained to be done at any future time, and the defendants were liable although subsequently robbed of the money.—Chiles v. Garrison. 475.
5. *Hiring.*—If the guardian hire out the slaves of the ward, the possession of the bailee is, as between guardian and ward, the possession of the guardian. —Sallee v. Arnold, 532.

BANKS.

1. *Account Current—Balance.*—A banker is not required by law to apply a balance due by him on account current to his depositor to the payment of a liability from his customer to himself upon a bill or note. In a suit by the banker against the acceptor of a bill, the fact that the drawer had an account with the banker, and that after protest of the bill there were balances in favor of the drawer, would not be evidence in favor of the acceptor to show a payment or satisfaction by the drawer.—Citizens' Bank, &c., v. Carson, 191.

BILLS OF EXCHANGE AND NOTES, NEGOTIABLE.

1. *Notice of Protest.*—A notice of protest, to bind the endorser of a note, must be left at his usual place of business, and not merely in the building in which he does business.—Kleinman v. Boernstein, 311.
2. *Note.*—When a holder of a note secured by mortgage had prior to his bankruptcy endorsed the note to third parties as collateral security for the performance of conditions, and the endorsees subsequent to the bankruptcy transferred the notes without endorsement to the plaintiff's intestate; *held*, that the plaintiff, having the legal title, had the right to enforce collection of the note and the foreclosure of the mortgage, and that the liability of the plaintiff to account to the assignee in bankruptcy did not affect the right of the plaintiff.—Overall, Adm'r, v. Ellis, 322.
3. *Consideration—Note.*—A note given by an heir as a memorandum or evidence of an amount advanced to him by the payee, is without valuable consideration, and as an evidence of debt is void.—Hardin, Adm'r, v. Wright, 452.
4. *Note—Endorsee.*—The endorsee of a negotiable note, endorsed to him after maturity, takes it subject to the equities existing between the maker and endorser.—Farris v. Catlett, 469.
5. *Note—Equity.*—An answer setting forth that the note sued upon was endorsed to the holder after maturity as a collateral security, and with notice of an agreement between the maker and payee that the note was to be delivered to trustees to pay off encumbrances upon the lands in consideration of the purchase of which the note was given, presents a defence in equity which it was error to strike out and give judgment for the plaintiff.—*Id.*
6. *Maturity of.*—Where the defendant had become security upon notes given in consideration of lands sold to the principal, and the principal subsequently executed a deed of trust to secure payment of the same notes, which deed

BILLS OF EXCHANGE AND NOTES, NEGOTIABLE—*Continued.*

contained a proviso that in case of default for thirty days in the payment of any one of the notes, all the notes should become due and payable, and that the trustees might proceed to sell the lands and pay all of said notes, whether due on their face or not; *held*, 1. That by the terms of the deed the notes became due only so far as to authorize a payment from the proceeds of sale, and that no suit could be prosecuted upon them until they matured.—Morgan v. Martien, 438.

BOATS AND VESSELS.

1. *Power of Master.*—The master of a boat in the home port has no authority as master to give bond and procure security for the discharge of the boat under the 14th section of the act relating to boats and vessels, (R. C. 1855, p. 307,) so as to bind the owners to reimburse the security for such sums as he may be compelled to pay. He is not the agent of the owners for such a purpose, and they will not be liable unless they recognize or ratify his acts in some manner.—Carr v. Burke, 233.
2. *Power of Master.*—The master of a steamboat may, in the home port, in his capacity of agent, employ persons to serve on the boat, and contract for the necessary stores and supplies.—*Id.*
3. *Contract—Privity.*—Where a steamboat was attached, in her home port, under the statute for a breach of a contract of affreightment, and the master procured a security to unite with him in giving bond to procure the discharge of the boat, and judgment was rendered against the master and security, the security was compelled to pay the judgment; *held*, that the security could not recover as for money paid and expended against the enrolled owners, without showing that he became security at their request, or that they ratified the acts of the master, or that there was some privity of contract either in fact or in law. Bates, Judge, dissenting.—*Id.*
4. *Forwarder.*—It is the duty of a forwarding merchant to advise his consignee of the shipment made to his address, and the failure of the carrier to deliver the goods shipped in accordance with the bill of lading will not discharge him of liability.—Railey v. Porter, 471.

BONDS, NOTES, AND CHOSES IN ACTION.

See BILLS OF EXCHANGE.

1. *Assignment of right of action.*—To give the grantee in the assignment of a lease a right of action upon the broken covenants of a prior assignee, the right of action upon the breaches of the covenant must be assigned. The verbal promises of the prior assignee to the subsequent assignee to pay the sum due for the breaches of the covenant would be void for want of consideration between the parties.—Woodburn v. Renshaw, 197.

C

CONFLICT OF LAWS.

1. *Sale—Assignment—Insolvent.*—The bankrupt and insolvent laws of each State or nation bind and affect their own citizens, and as against them will be enforced by the courts of other States when questions arise as to the title conveyed under such laws. Therefore, where plaintiffs and defendants were citizens of Louisiana, and the defendants had made an assignment of

CONFLICT OF LAWS—*Continued.*

their property in accordance with the laws of that State for the benefit of their creditors, and a syndic or assignee had been appointed to collect and distribute the assets of the insolvents, one of the creditors, a citizen of, and residing in that State, cannot secure a preference over the remaining creditors in his own State by process of attachment against the property and assets of the insolvents in this State. As against such attachment, the title of the assignee of the insolvents will prevail.—Einer v. Beste & Deynood, 240.

CONTRACTS.

1. *Prtvity.*—Where a steamboat was attached, in her home port, under the statute for a breach of a contract of affreightment, and the master procured a security to unite with him in giving bond to procure the discharge of the boat, and judgment was rendered against the master and security, the security was compelled to pay the judgment; *held*, that the security could not recover as for money paid and expended against the enrolled owners, without showing that he became security at their request, or that they ratified the acts of the master, or that there was some privity of contract either in fact or in law. Bates, Judge, dissenting.—Carr v. Burke, 233.
2. *Jurisdiction—Patent.*—The courts of the State have jurisdiction in cases of contracts in which patents are brought in collaterally. When the defendants, who had been sued for a breach of the plaintiff's patent for putting up cemented hams, agreed with the plaintiff that if he would dismiss the suit againt them, and allow them the partial use of the patent for the year, they would not manufacture or put up cemented hams of any kind during the existence of the patent; *held*, that the suit upon such contract was properly brought in the State courts.—Billings v. Ames, 265.
3. *Restraint of Trade.*—*Held*, also, that such contract was not void, as being in restraint of trade. (Presbury v. Fisher & Bennett, 18 Mo. 50, cited.)—*Id.*
4. *Construction.*—*Held*, also, that such contract not only prohibited the defendants from putting up the article covered by the patent, but from putting up articles resembling those described in the patent and liable to compete therewith in market.—*Id.*
5. *Damages.*—In an action upon such contract, the measure of damages was properly declared to be the amount the plaintiff's hams had depreciated in price by the cemented hams put up and sold for defendants, after the expiration of the year mentioned in the contract, and before the commencement of this suit.—*Id.*
6. *Consideration.*—Plaintiffs having an unconfirmed claim to lands, released the same to the defendant, he undertaking to prosecute the claim at his own expense, and for which he was to pay, if successful, a sum stipulated. The deed *inter partes*, also stipulated that after confirmation the land was to be considered as mortgaged for the consideration money. The defendant prosecuted the claim which was confirmed by Congress *Held*, that when the claim was confirmed, the consideration became due.—Clamorgan v. Greene, 285.
7. *Sunday.*—No damages can be recovered for a breach of contract for unnecessary labor to be done on Sunday, such as playing music at a beer-garden. (R. C. 630, § 33.)—Bernard v. Lüpping, 341.

CONTRACTS—*Continued.*

8. *Special.*—Where the plaintiff specially contracted with the defendant to serve the defendant for a definite service, at a fixed price, and before the completion of his contract voluntarily and without cause left the employment of the defendant, he can recover nothing for his services. (Posey v. Garth, 7 Mo. 96; Dickson v. Caldwell, 17 Mo. 575; and Schnerr v. Lemp, 19 Mo. 40. Approved.)—Henson v. Hampton, 408.
9. *Consideration—Note.*—A note given by an heir as a memorandum or evinence of an amount advanced to him by the payee, is without valuable consideration, and as an evidence of debt is void.—Hardin, Adm'r, v. Wright, 452.
10. *Sale—Fraud.*—When a vendor sells property having a latent defect of which he is aware, but which he fails to disclose to the vendee, knowing that the latter is acting upon the supposition no such defect exists, he is guilty of a fraud, and the fraud may be pleaded as a defence to an action for the price of the property.—Cecil, Adm'r, v. Spurger, 462.
11. *To marry.*—In a suit for breach of promise of marriage, it is necessary to prove the mutual promises of both plaintiff and defendant.—Standiford v. Gentry, 477.
12. *Repairs.*—Where the defendant contracted with the plaintiff to build a bridge in accordance with certain plans and specifications, and bound himself to keep such bridge in repair for the term of three years, he is not liable to rebuild if the bridge be destroyed by fire.—Livingston County v. Graves, 479.

CORPORATIONS, MUNICIPAL.

1. *Independence.*—The City of Independence has, by virtue of its charter, authority to provide by ordinance for the punishment of offences against the peace of the city, and for the offence of attempting to rescue a prisoner from the custody of its officers. (Acts, 1853, p. 64.)—City of Independence v. Moore, 392.

CORPORATIONS.

1. *Evidence—Name.*—The plaintiff claiming to be a corporation by the laws of New York, sued by the name of "The Bank of Commerce." The articles of association produced to prove the plaintiff's right to sue as a corporation declared that the name to be used should be "Bank of Commerce, in New York." *Held*, that the articles offered were not competent evidence to prove the existence of a corporation bearing the name of the plaintiff.—Bank of Commerce v. Mudd, 218.
2. *Powers.*—Every corporation in this State has power to hold, purchase and convey such real and personal estate as the purposes of the corporation shall require, not exceeding the amount limited in the charter. Therefore, a corporation created for the purpose of mining and transportation of coal, etc., had the power to purchase and use a steamboat for the purposes of its business in transporting and delivering coal, etc.—Callaway Min'g & Man'g Co. v. Clark, 305.
3. *Entries—Evidence.*—Where the defendant, sued as a corporation, pleaded that it had not organized under the acts of incorporation, the book of entries containing the articles of the association signed by the associates, and the

CORPORATIONS—*Continued.*

record of the proceedings, was properly admitted in evidence to prove the actual organization of the corporation.—Foster v. White Cloud City Co., 505.

CONSTABLES.

See OFFICER, 1, 3.

CONVEYANCES.

1. *Description—Uncertainty.*—A deed dated March 6, 1775, from G. to O., described "a lot of one arpent in front by forty arpens in depth, situated in the Grand Prairie; bounded on one side by Mr. Laclede, and on the other side by the said vendor, such as it now exists, which the said O. has seen and is satisfied therewith." At the date of the deed G. owned a lot of three by forty arpens, which was bounded on both sides by Mr. Laclede. *Held,* that the deed was void for uncertainty of description.—Bell v. Dawson, 79.
2. *Powers—Marriage Settlement.*—In view of marriage, property was conveyed by settlement and contract by the intended wife, to trustees, to hold until marriage to the use of the grantor and her heirs, and from the marriage to the sole and separate use, benefit and disposal of the wife for and during her natural life, free of her husband's control, &c., and to such uses as the said wife might by writing, &c., direct and appoint; and on her death to such uses as she by will might appoint and direct; and if she died intestate, to the use of the issue of the marriage then living; and in default of such issue, to the use of the heirs of said wife. The deed further provided that all the property might from time to time be successively charged, invested and reinvested indefinitely by the trustees on the request in writing, &c., of the wife. *Held,* that the wife, with the trustees, could, by proper conveyances, pass the fee of the lands settled by the deed, and that she was not confined to the disposal of a life estate only.—Pendleton v. Bell, 100.
3. *Trust.*—R. P. and his children being jointly interested in land with G. P. and his children, the land was sold in partition and purchased by R. P. for the joint benefit of himself and G. P., no money being paid except the costs, of which each paid one half. R. P. gave G. P. a written acknowledgment, as follows: "I do hereby declare that the purchases which I made, &c., were made for the joint account of G. P. and myself on a verbal agreement between him and me—the deeds of sale are to be made by the commissioner to me. If G. P. wishes to have one half of each tract, I shall execute deeds to him to that purpose; otherwise and until then, whenever I shall sell any part of either, I shall account to him for the one half of the nett proceeds." *Held,* that the trust was a trust for the purpose of converting the land into money, and might as well be executed by the executor of R. P. after the death of G. P. and R. P. as by R. P. himself, no request for a conveyance prior to the sale being shown.—Paul v. Fulton and Brotherton, 110.
4. *Powers.*—By a marriage contract dated July 6, 1842, between W. R., the father of A. R., and A. R. with T. A., it was agreed that all property that said W. R. might give or convey to said A. R. or T. A., or to their use, and the rents, issues and profits thereof, should be held and enjoyed in accordance with the terms of the conveyance or instrument of writing settling such

property, except as in such contract afterward specially provided. It was further provided by the second article of said contract, that at any time during the marriage the parties to the contract might sell any of the property that might be conveyed by the said W. R. to the said T. A. or A. R., in accordance with the preceding stipulation, except where different provisions should be made by the deed of conveyance, in which case the provisions of the deed should control. The contract provided further, by article 4, that W. R. should purchase and settle upon his daughter A. R., to provide an annual income, productive real estate in the city of St. Louis, to be selected by him, in trust that the income should be paid to the said A. R., or her written order, during her natural life; and in case she should die leaving a child or children surviving her, then the payment to be made to such children until the youngest should attain the age of twenty-one years, at which time the fee should vest in such surviving child or children, &c. But if said A. R. should die without issue, then the absolute estate in said estate should revert to the said W. R. and his heirs. W. R. owning, at the time, a large amount of unproductive real estate, after the marriage, by deed of June 9, 1843, conveyed seven tracts of land in fulfilment of the purposes mentioned in the marriage contract to the said A. R., *to hold* to her sole use for life, and after her death to such of the children of said Ann as should attain twenty-one years of age, &c. But if the said A. R. died without issue, or issue attaining said age, then the title to revert to said W. R. or his heirs—the limitations prescribed by the deed following generally the stipulations of the contract for the purchase and settlement of income-producing property. Subsequently, W. R. purchased productive real estate, in compliance with the contract, and in satisfaction of the agreement to settle real estate producing income, and settled the same upon his daughter, and she, with her husband, acknowledged that the stipulations of the contract in that respect had been fully complied with. The plaintiffs, as agents for T. A., contracted for the sale of one of the pieces of land conveyed by W. R. to his daughter by their deed of June 9, 1843; and the said T. A. and wife, and the said W. R., joined in a conveyance to the purchaser, who refused to comply with his purchase, alleging that the deed tendered did not pass a good title in fee simple. Upon a suit by the plaintiffs against T. A., to recover the commissions due them for effecting a sale which fell through on account of a defect in the title, *held*, that by virtue of the marriage contract, and the deed of June 9, 1843, that the deed of W. R. and T. and A. A. to the purchaser, was a good and effective deed to pass the fee, and that the sale had not failed from any fault of the defendant.—Kent & Obear v. Allen, 87.

5. *Powers.*—A deed, dated March 31, 1810, granted lands to a married woman, to hold to her and her heirs in a direct line, to have, manage and dispose of at her will and pleasure, not be liable to the acts of her husband, it being necessary that said lot should always remain as the property of the children, the heirs of the said wife. *Held*, that the wife took an estate in fee simple with full power to convey the title absolutely.—English v. Beehle, 186.

6. *Covenant, not running with the land.*—A covenant by the assignee of a lease,

CONVEYANCES—*Continued.*

with his assignee, that the premises were free and clear of and from taxes, assessments and encumbrances, the failure to pay which exposed the lease to forfeiture, and which was broken as soon as made by the actual liability for taxes and assessments due at the date of the covenant, does not run with the land to the grantee of the second assignee by a deed conveying merely the leasehold premises.—Woodburn v. Renshaw, 197.

7. *Tax Sale—Deeds.*—Where the statute required that the sale of lands for taxes should be made before the courthouse door of the county, and the sale was made inside the courthouse, the sale was void and no title passed by the sale and the register's deed thereupon. (Revenue, R. C. 1845, p. 949.)—Rubey v. Huntsman, 501.

8. *Attachment—Description—Deed.*—The sheriff's return of the levy of an attachment upon the land of the defendant should describe the land with as much certainty as a sheriff's deed.—Henry v. Mitchell, 512.

9. *Proof of.*—Under the act of 1804, 1 T. L. p. 47, § 8, it was not necessary that the officer taking the proof by the subscribing witness of the execution of the deed by the grantors, should certify that the witness was known to him.—Johnson v. Prewitt, 553.

COUNTY COURT.

See INJUNCTION, 1, 2.

1. *Constable.*—The County Court has no power to vacate the office of a constable, nor any general power to do such acts as shall cause his office to become vacant. Neither has it power, by virtue of the statute relating to constables, (R. C. 1855, p. 346, § 3,) to require the constable to give a new bond, because the penalty in the bond previously given was, in the estimation of the court, insufficient. Where, therefore, the County Court, without a notice to show cause, made an order requiring the constable to give a new bond with a larger penalty than his original bond, and subsequently declared his office vacant upon his failure so to do, and a new constable was appointed by the justice of the township, who gave bond; *held*, that the acts of the County Court were void, and that the securities upon the original bond were liable for moneys collected by the constable upon executions after such acts. Although the court, at a subsequent term, revoked its order, and the constable gave an additional bond, the original bond was not discharged by virtue of 4th section of the statute.—Sheeley v. Wiggs, 398.

CORONER.

1. *Object of Inquest—Fees.*—The object of a coroner's inquest is to ascertain the cause of the death. The authority of the coroner, in this branch of his office, is necessarily judicial in its character. Being the sole judge as to the propriety or necessity of holding the inquest, his action in that respect is not subject to revision by the county commissioners; and he is entitled to fees under the statute notwithstanding the verdict of the coroner's jury discloses that the deceased died of a natural death, and not by casualty or violence.—Boisliniere v. Board of Co. Com., 375.

COVENANT.

1. *Not running with the land.*—A covenant by the assignee of a lease, with his

COVENANT—*Continued.*

assignee, that the premises were free and clear of and from taxes, assessments and encumbrances, the failure to pay which exposed the lease to forfeiture, and which was broken as soon as made by the actual liability for taxes and assessments due at the date of the covenant, does not run with the land to the grantee of the second assignee by a deed conveying merely the leasehold premises.—Woodburn v. Renshaw, 197.

2. *Assignment of right of action.*—To give the grantee in the assignment of a lease a right of action upon the broken covenants of a prior assignee, the right of action upon the breaches of the covenant must be assigned. The verbal promises of the prior assignee to the subsequent assignee to pay the sum due for the breaches of the covenant would be void for want of a consideration between the parties.—*Id.*

3. *Release—Covenant not to sue.*—A judgment was rendered June 7, 1823, in favor of the United States against A and B upon an official bond, in which B was principal and A was security. B died, leaving a widow and a daughter, his only heir. Part of the judgment was levied of the property of A. C, being the owner of lands to which the heir of B set up a claim, obtained a transfer of the judgment from the United States, and procured a revival of the judgment against A and the administrator of B, in March, 1851. The revived judgment was allowed against the estate of B by the St. Louis Probate Court on June 15, 1852, for $34,772.34, and placed in the fourth class of claims. At the March term, 1852, of said court, a claim in favor of A was allowed against the estate of B for the sum of $10,244.67, and placed in the fifth class. A compromise was made between C and the heir of B on December 7, 1849, and C made a covenant with the widow and heir of B that he would not use the judgment against the estate and the lands descended, with the exception of the lands claimed and owned by C, and also reserved to himself the right to use the judgment against A and his property. Of this covenant A was cognizant, and by his agent made an agreement with C, and for the consideration of $4,000 C covenanted with A that he would not use the judgment against A, except to protect his title to the lands specified in the covenant with B's heir. By order of the Probate Court, the lands of B were sold, and at a final settlement there was a balance in the hands of the administrator of B, the proceeds of lands not specified in the covenant, to the amount of $6,638.55, which the Probate Court ordered to be paid upon the claims allowed in the fourth class, which left nothing for the claim of A. A brought his suit, alleging that the covenant of C with the heir of B was a release of the judgment, which, by collusion and fraud between C and the administrator of B, had been fraudulently revived and allowed, and praying that the judgment of C might be postponed, and that the moneys in the hands of the administrator might be applied to the payment of the claim allowed in favor of A. *Held*, 1. That the covenant of C with the widow and heir of B was not a release of the judgment, and could not have been so pleaded. 2. That although A was a security, yet as he was cognizant of that compromise, and had himself made a similar arrangement with C, he had no equity which gave him a right to require that his claim should be preferred to the judgment of C. (See same case, 27 Mo. 187.)—Hempstead v. Hempstead, 135.

CRIMES AND PUNISHMENTS.

See CRIMINAL PRACTICE.

1. *Sunday—Contract.*—No damages can be recovered for a breach of contract for unnecessary labor to be done on Sunday, such as playing music at a beer-garden. (R. C. 630, § 33.)—Bernard v. Lüpping, 341.
2. *Disturbance of Worship.*—To constitute the offence of disturbing religious worship, under the act, R. C. 1855, p. 630, § 30, it must appear that the acts charged as constituting the offence took place when the congregation were assembled for worship.—State v. Edwards, 548.
3. *Misdemeanors.*—Whatever act openly outrages decency and is injurious to public morals, is a misdemeanor at common law, and is indictable as such.—State v. Reuben Rose, 560.
4. *Larceny.*—The defendant was indicted for feloniously stealing cattle which had been levied upon by the sheriff by virtue of an execution against the defendant and committed to the custody of a third party for safe keeping. *Held*, that the State was bound to show affirmatively that the defendant knew of the execution and seizure of the cattle by the sheriff, so as to show a felonious intent in the taking.—State v. Dewitt, 571.

D

DAMAGES.

1. *Tenant.*—If a tenant be ejected by the landlord, he can only recover damages for the unexpired portion of his term.—Schlemmer v. North, 206.
2. *Officer.*—In an action against an officer for carelessly taking insolvent securities to a bond for the return of personal property taken and delivered by order of a court, the officer is liable only for the damages actually sustained by the party, and not for the amount of the judgment recovered against the principal on the bond in the original suit. Where the defendant in the original suit claimed to retain possession as security for the freight and charges upon the property taken, he could not recover against the officer if the amount of his claim had been paid him.—Mortland v. Smith, 225.
3. *Evidence of.*—In an action against an officer for neglect of duty in taking a delivery bond, the record of the judgment in the suit in which the bond was taken will be evidence against the officer that said judgment had been rendered, but not of the amount of damage sustained.—*Id.*
4. *Contract—Measure.*—When the defendants, who had been sued for a breach of the plaintiff's patent for putting up cemented hams, agreed with the plaintiff that if he would dismiss the suit against them, and allow them the partial use of the patent for the year, they would not manufacture or put up cemented hams of any kind during the existence of the patent; *held*, that, in an action upon such contract, the measure of damages was properly declared to be the amount the plaintiff's hams had depreciated in price by the cemented hams put up and sold for defendants after the expiration of the year mentioned in the contract, and before the commencement of this suit.—Billings v. Ames, 265.
5. *Measure.*—The measure of damages for the taking and detention of personal property will be the actual damages sustained by the seizure; the question of speculative profit or loss cannot enter into the estimate. Where a steamboat was seized, *held*, that the jury should not be allowed to speculate as to what might be the probable or expected profits or earnings of the boat,

DAMAGES—*Continued.*

(Taylor v. Maguire, 12 Mo. 313, cited and approved.)—Callaway Min'g & Man'g Co. v. Clark, 305.

6. *Special contract.*—Where the plaintiff specially contracted with the defendant to serve the defendant for a definite service, at a fixed price, and before the completion of his contract voluntarily and without cause left the employment of the defendant, he can recover nothing for his services. (Posey v. Garth, 7 Mo. 96; Dickson v. Caldwell, 17 Mo. 575; and Schneer v. Lemp, 19 Mo. 40. Approved.)—Henson v. Hampton, 408.

DOWER.

1. *Limitations.*—The act limiting actions for the recovery of real estate, of February 24, 1847, and the same act R. C. 1855, p. 1045, does not include the limitation of suits for dower.—Littleton v. Patterson, 357.
2. *Fraud—Will.*—Voluntary deeds in the nature of a will made with the intent to deprive a wife of her dower, would be, as to her, fraudulent and void. (S. C. 29 Mo. 350.)—Tucker v. Tucker, 464.

E

EJECTMENT.

See LANDS AND LAND TITLES. CONVEYANCES. LIMITATIONS, 5.

1. *Judgment, bar of.*—A judgment in an action of ejectment is no bar to the prosecution of another suit for the recovery of the same premises. The provision of R. C. 1855, p. 695, § 33, was repealed by act of November 21, 1857. (Acts 1857, p. 34.)—Slevin v. Brown, 176.
2. *Trustee—Wife's Estate.*—Where the legal title in a leasehold estate in lands was vested in a trustee for the benefit of the wife, the death of the wife will not prevent the trustee from recovering the possession of the property in ejectment. The legal title remains in the trustee.—*Id.*

EQUITY.

1. *Mistake—Specific Performance.*—When a contract for the sale of land had been executed by the vendor by his delivery of a deed to the purchaser, in which the grantee was misdescribed by the name of *John*, when his true name was *James*, the vendee was not entitled to bring his action to enforce a specific performance of the contract, but should have filed his petition in equity to correct the mistake in the deed in the description of the grantee.—Colt v. Beaumont, 118.
2. *Mistake.*—A court of equity will reform an instrument which, by reason of a mistake, fails to execute the intention of the parties, as well upon an equitable defence set up in an answer, as in a suit brought directly for that purpose. (Leitensdorfer v. Delphy, 15 Mo. 160, affirmed.)—Hook, Adm'r, v. Craighead, 405.
3. *Note—Endorsee.*—The endorsee of a negotiable note, endorsed to him after maturity, takes it subject to the equities existing between the maker and endorser.—Farris v. Catlett, 469.
4. *Note—Equity.*—An answer setting forth that the note sued upon was endorsed to the holder after maturity as a collateral security, and with notice of an agreement between the maker and payee that the note was to be delivered to trustees to pay off encumbrances upon lands in consideration of

EQUITY—*Continued.*

the purchase of which the note was given, presents a defence in equity which it was error to strike out and give judgment for the plaintiff.—*Id.*

5. *Notice.*—The clerk of a Circuit Court in which a suit for specific performance of a contract for the sale of land is pending, thereby has notice of the nature of the claim of plaintiff.—Dickerson v. Campbell, 544.

ERROR.

See PRACTICE, CIVIL, 21, 24, 25, 30, 31, 32, 34, 35, 36, 37.

ESTOPPEL.

1. *In pais—Mortgage.*—Where the party beneficially interested in lands sold under a deed of trust to secure a debt, the sale of which was voidable because the lands were put up in a lump, subsequently induces a third party to purchase the lands from the vendee at the trustee's sale, he cannot afterward be allowed to attack the validity of the sale.—Taylor's Heirs v. Elliott, 172.

2. *Recitals.*—Where, in a deed conveying an unconfirmed claim to land, without any warranty of title, both parties had recited that the grantors in the deed were the owners of the claim as the only surviving heirs and devisees of the assignee by purchase from the original claimant, they are estopped from denying the truth of such recitals.—Clamorgan v. Greene, 285.

EVIDENCE.

1. *Public Acts.*—The acts of Congress confirming claims to land in Missouri are public not private acts, and will be judicially noticed without being read in evidence.—Papin v. Ryan et al., 21.

2. *Ancient Deeds.*—Boyle v. Meegan, 19 How. 149, and Reaume v. Chambers, 22 Mo. 36, 53, cited and affirmed. Where the deed of a married woman was not executed in conformity with the law in force at the date of its execution so as to convey her estate, it will not become effective as an ancient deed from lapse of time.—Boyle v. Chambers, 46.

3. *Practice.*—When the plaintiff reads in evidence a portion of an answer of defendant, he must read the whole of a sentence, and not omit that part which qualifies the statement read.—Bompart v. Lucas, 123.

4. *Variance.*—The plaintiff claiming to be a corporation by the laws of New York, sued by the name of "The Bank of Commerce." The articles of association produced to prove the plaintiff's right to sue as a corporation declared that the name to be used should be "Bank of Commerce, in New York." *Held*, that the articles offered were not competent evidence to prove the existence of a corporation bearing the name of the plaintiff.—Bank of Commerce v. Mudd, 218.

5. *Records.*—In an action against an officer for neglect of duty in taking a delivery bond, the record of the judgment in the suit in which the bond was taken will be evidence against the officer that said judgment had been rendered, but not of the amount of damage sustained.—Mortland v. Smith, 225.

6. *Records.*—Records are evidence for or against those only who are parties or privies thereto. Upon an issue upon a plea in abatement in an attachment, it was erroneous to permit the defendant to read in evidence the record of suits between other parties, involving the validity of a conveyance made

EVIDENCE—*Continued.*

by the defendant, alleged to have been fraudulent.—Norcross v. Hudson, 227.

7. *Objection—Reasons.*—Where an objection is made to the admission of evidence in the court below, the reason of the objection must be stated, or the matter will not be reviewed by the Supreme Court.—Knipper v. Bechtner, 255.

8. *Witness.*—It was improper to permit witness to state that it was *not* the custom to make contracts of a particular character, which were not illegal and which the parties were competent to make.—Goodfellow's Ex'rs v. Meegan, 280.

9. *Writings.*—When the defendant alleged that he had been deceived by the fraudulent misrepresentations of the plaintiffs, an unexecuted agreement between plaintiffs and defendant, which the latter had taken to his attorney for the purpose of having a proper agreement drawn, was correctly admitted in evidence in connection with other testimony, to show that defendant knew the facts which he alleged had been fraudulently concealed by the plaintiffs —Clamorgan v. Greene, 285.

10. *Lost Instrument.*—The testimony of a party to prove the loss of an instrument may be taken by deposition with the same effect as if he had been placed upon the stand. But the affidavit of the party to prove such loss is inadmissible. Before such testimony can be admitted, the previous existence of the instrument must be shown by other evidence.—Gould v. Trowbridge, 291.

11. *Absconding.*—The fraudulently disposing of his goods in a clandestine manner, is evidence against a party against whom an attachment issues, on the ground that the defendant has absconded, for the purpose of showing the intent of the absence.—Ross v. Clark, 296.

12. *Lost Writings.*—Evidence of the contents of letters cannot be given until their absence is accounted for, and the inability to produce them shown.—Farrell's Adm'r v. Brennan's Adm'x, 328.

13. *Sanity of Testator.*—Witnesses acquainted with testator may state their opinions as to his sanity, but should not be asked "if they thought his mind sound enough to make a will," as that would involve a question of law for the court to determine, and not the witness.—*Id.*

14. *Relevancy.*—The testimony admitted upon trial must be relevant to the issues submitted to the jury.—Eddy v. Baldwin, 369.

15. *Declarations.*—The declarations of the maker of a deed attacked for fraud are not evidence in favor of those claiming under such deed.—Tucker v. Tucker, 464.

16. *Corporation—Entries.*—Where the defendant, sued as a corporation, pleaded that it had not organized under the acts of incorporation, the book of entries containing the articles of the association signed by the associates, and the record of the proceedings, was properly admitted in evidence to prove the actual organization of the corporation.—Foster v. White Cloud City Co., 505.

17. *Date of Deeds.*—In a suit by the landlord against his tenant for breach of covenant of the lease to cultivate the land in a husbandlike manner, evidence was properly admitted to prove that the lease was executed on a different day from that stated in the instrument.—Hall v. Hoffman, 519.

EVIDENCE—*Continued.*

18. *Declarations.*—Declarations made by the endorser of a bill of exchange, or note, affecting the validity of the bill, and not known to the endorsee, are not evidence against the endorsee.—Blancjour v. Tutt, 576.

EXECUTION.

1. *Lien of Execution.*—Upon the receipt of an execution by the officer, the lien of the writ attaches to the personal property of the defendant, and a levy and sale will pass the title notwithstanding a transfer by the judgment debtor made after such receipt. The lien attaches in the same manner to property acquired by the debtor after the execution comes into the hands of the officer. (R. C. 1855, p. 964.)—State, to use of Beazley, v. Blundin, 387.
2. *Levy—Execution Sale.*—When a tract of land has been laid out into blocks and lots, with streets and alleys dedicated to the public use, and some of the lots have been sold to third parties, an attachment subsequently levied upon the tract, by its description before subdivision, will be a nullity; and an execution sale, under the judgment in the attachment suit, will not convey the title.—Henry v. Mitchell, 512.
3. *Attachment—Description—Deed.*—The sheriff's return of the levy of an attachment upon the land of the defendant should describe the land with as much certainty as a sheriff's deed.—*Id.*
4. *Limitation—Practice.*—The statute of limitations may be set up by the sheriff as a defence to a motion for judgment against him under sec. 67 of the act respecting Executions, R. C. 1855, p. 751, without being specially pleaded.—Mitchell v. Fulbright, 551.

F

FEES.

1. *Clerks.*—The act of January 25, 1861, (Acts 1860-61, p. 31,) in relation to fees, was not repealed by the act of March 28, 1861, (Acts 1860-61, p. 30.)—State, *ex rel.* McDermott, v. Auditor, 222.
2. *Circuit Attorney.*—The circuit attorney, for prosecuting or defending suits for or against one of the counties of his circuit, is entitled to no greater compensation than that allowed by the statute. (R. C. 1855, p. 756, § 2, and p. 275, § 13.)—Freeman v. Henry County, 446.

FORCIBLE ENTRY AND DETAINER.

1. *Parties.*—The action of forcible entry and detainer must be brought against the party in actual possession of the premises at the time of suit brought. (R. C. 1855, p. 1787.)—Orrick v. St. Louis Public Schools, 315.

FRAUDS, STATUTE OF.

See ATTACHMENTS.

FRAUDULENT CONVEYANCES.

1. *Solvency.*—The solvency required by law, which will sustain a voluntary deed, consists not only in the present ability of the debtor to pay his debts, but in such a condition of his means that payment can be enforced by process of law.—Eddy v. Baldwin, 369.
2. *Absconding—Evidence.*—The fraudulently disposing of his goods in a clandestine manner, is evidence against a party against whom an attachment is-

FRAUDULENT CONVEYANCES—*Continued.*

sues on the ground that the defendant has absconded, for the purpose of showing the intent of the absence.—Ross v. Clark, 296.

3. *Fraud—Will.*—Voluntary deeds in the nature of a will made with the intent to deprive a wife of her dower, would be, as to her, fraudulent and void. (S. C. 29 Mo. 350.)—Tucker v. Tucker, 464.

G

GUARDIAN AND WARD.

1. *Disbursements.*—If a guardian voluntarily disburse on account of his ward a sum greater than the ward's estate, he has no recourse upon the ward for the overplus unless there be a special promise to pay it. (Wyatt v. Woods, 31 Mo. 351, affirmed.)—Frost v. Winston, 489.
2. *Accounts—Interest.*—Where a guardian had moneys of his ward, and had lent or could have lent the same at the highest legal rate of interest, when called to account he will be properly charged with that rate, with annual rests, but should be allowed a reasonable commission as the guarantor of payment. —*Id.*
3. *Possession of.*—The possession of the goods and chattels of the ward by the guardian, is the possession of the ward. He acts in a merely fiduciary capacity, and is the agent of the ward in all matters relating to the trust property.—Sallee v. Arnold, 532.

H

HUSBAND AND WIFE.

1. *Wife's Estate in Lands.*—The husband cannot, in this State, by his deed, alien the estate of his wife in lands without her consent.—Boyle v. Chambers, 46.
2. *Paraphernalia.*—The husband could not, by the Spanish law, alienate the wife's paraphernal property without her consent.—*Id.*
3. *Wife's Estate.*—Where the legal title in a leasehold estate in lands was vested in a trustee for the benefit of the wife, the death of the wife will not prevent the trustee from recovering the possession of the property in ejectment. The legal title remains in the trustee.—Slevin v. Brown, 176.
4. *Wife's Estate, liability of.*—Property had been conveyed to trustees to the sole use of a married woman, &c., "and to such uses and purposes, and in such manner as she might, in writing, appoint." Subsequently she became endorser of a negotiable promissory note. *Held*, that such endorsement was an appointment in writing, and that she thereby charged her separate estate. —Claflin v. Van Wagoner et al., 252.
5. *Pleading—Parties.*—Where the action concerns the separate property of the wife, she must sue or defend by her next friend, without joining the husband. (R. C. 1855, p. 1218, Practice, Art. II., § 7.)—*Id.*
6. *Pleading—Parties.*—Where it is sought to charge the wife's separate estate with her debts, her trustee is a proper party defendant, so that in case of sale the legal title may be conveyed. (R. C. 1855, p. 1218, § 4.)—*Id.*
7. *Ward.*—Where a female ward marries, the marital rights of the husband attach to the goods and chattels of the ward in the possession of the guardian, and he may demand and recover the same although the wife die before he obtain the actual possession.—Sallee v. Arnold, 532.

I

INJUNCTION.

1. *State—Party.*—The State cannot properly be made a party plaintiff, at the relation of a private citizen, to a bill of injunction to restrain the County Court of a county from issuing its bonds or levying a tax to pay for a subscription to the stock of a railroad company. The State has no interest, legal or equitable, in the subject matter.—State, to use, v. Parkville and Grand River Railroad Co., 496.
2. *Against levying Tax.*—An injunction will not be granted, at the instance of a tax-payer, to restrain a County Court from levying a tax, upon the ground that the court had no jurisdiction, and that its action was a nullity. It must appear that the injury to the tax-payers would be irreparable, or such as could not be redressed by action at law. (Sayre v. Tompkins, 23 Mo. 443, affirmed.)—*Id.*

INSOLVENT.

1. *Sale—Assignment.*—The bankrupt and insolvent laws of each State or nation bind and affect their own citizens, and as against them will be enforced by the courts of other States when questions arise as to the title conveyed under such laws. Therefore, where plaintiffs and defendants were citizens of Louisiana, and the defendants had made an assignment of their property in accordance with the laws of that State for the benefit of their creditors, and a syndic or assignee had been appointed to collect and distribute the assets of the insolvents, one of the creditors, a citizen of, and residing in that State, cannot secure a preference over the remaining creditors in his own State by process of attachment against the property and assets of the insolvents in this State. As against such attachment, the title of the assignee of the insolvents will prevail.—Einer v. Beste & Deynood, 240.
2. *Fraud—Solvency.*—The solvency required by law, which will sustain a voluntary deed, consists not only in the present ability of the debtor to pay his debts, but in such a condition of his means that payment can be enforced by process of law —Eddy v. Baldwin, 369.

INTEREST.

1. *Guardian—Accounts.*—Where a guardian had moneys of his ward, and had lent or could have lent the same at the highest legal rate of interest, when called to account he will be properly charged with that rate, with annual rests, but should be allowed a reasonable commission as the guarantor of payment.—Frost v. Winston, 489.

J

JUDGMENT.

See PRACTICE, CIVIL, 29, 30, 31, 32, 35, 36, 37, 38.

1. *Ejectment—Judgment, bar of.*—A judgment in an action of ejectment is no bar to the prosecution of another suit for the recovery of the same premises. The provisions of R. C. 1855, p. 695, § 33, was repealed by act of November 21, 1857. (Acts 1857, p. 34.)—Slevin v. Brown, 176.

JURISDICTION.

See OFFICER QUO WARRANTO.

1. *Waiving demand.*—A party may waive part of his demand for the purpose of giving jurisdiction to an inferior court. (Hempler v. Schneider, 17 Mo. 258, and Denny v. Eckelkamp, 30 Mo. 146, affirmed.)—Matlack v Lare, 262.
2. *State Courts—Patent.*—The courts of the State have jurisdiction in cases of contracts in which patents are brought in collaterally. When the defendants, who had been sued for a breach of the plaintiff's patent for putting up cemented hams, agreed with the plaintiff that if he would dismiss the suit againt them, and allow them the part al use of the patent for the year, they would not manufacture or put up cemented hams of any kind during the existence of the patent; *held*, that the suit upon such contract was properly brought in the State courts.—Billings v. Ames, 265.
3. *Constable—County Court.*—The County Court has no power to vacate the office of a constable, nor any general power to do such acts as shall cause his office to become vacant. Neither has it power, by virtue of the statute relating to constables, (R. C. 1855, p. 346, § 3,) to require the constable to give a new bond, because the penalty in the bond previously given was, in the estimation of the court, insufficient. Where, therefore, the County Court, without a notice to show cause, made an order requiring the constable to give a new bond with a larger penalty than his original bond, and subsequently declared his office vacant upon his failure so to do, and a new constable was appointed by the justice of the township, who gave bond; *held*, that the acts of the County Court were void, and that the securities upon the original bond were liable for moneys collected by the constable upon executions after such acts. Although the court, at a subsequent term, revoked its order, and the constable gave an additional bond, the original bond was not discharged by virtue of 4th section of the statute.—Sheeley v. Wiggs, 398.

JURORS.

1. *Practice—Crimes.*—A juror who has formed or declared an opinion upon the matter in issue is competent to serve, if the opinion was founded only on rumor and did not bias or prejudice his mind. (R. C. 1855, p. 1191, § 14.)—State v. Rose, 346.

JUSTICES' COURTS.

1. *Appeals.*—A non-resident of the county against whom a judgment by default is rendered by a justice of the peace, must move to set aside the judgment within ten days from its rendition. The provision allowing the non-resident twenty days further in which to take his appeal, by § 3, art. 9, Justices' Courts, R. C. 1855, p. 671, does not apply to the application for setting aside the default.—Blanchard v. Hatch, 261.
2. *Appeal.*—Upon an appeal from a judgment of a justice, in a suit by attachment, the defendant may, in the Circuit Court, plead in abatement of the attachment, although he may have defended upon the merits before the justice. (R. C. 1855, p. 975.)—Phillips v. Bliss, 427.

L

LANDLORD AND TENANT.

1. *Freehold.*—Buildings erected upon land become part of the freehold, and do not belong to the tenant.—Schlemmer v. North, 206.

LANDLORD AND TENANT—*Continued.*

2. *Ejectment.*—If a tenant be ejected by the landlord, he can only recover damages for the unexpired portion of his term.—*Id.*
3. *Wife's Estate.*—Where the legal title in a leasehold estate in lands was vested in a trustee for the benefit of the wife, the death of the wife will not prevent the trustee from recovering the possession of the property in ejectment. The legal title remains in the trustee.—Slevin v. Brown, 176.

LAND AND LAND TITLES.

1. *Survey.*—The confirmation of a common field lot by virtue of the act of Congress of April 29, 1816, is a complete grant from the date of the act, and a survey is not required to fix the location and vest the title to the specific tract confirmed.—McCune v. O'Fallon, 13.
2. *Limitations.*—The statute of limitations in favor of an adverse possession of a field lot confirmed by the second section of the act of Congress of April 29, 1816, commences to run from the time of possession taken and before a survey of the claim by the United States. (Aubuchon v. Ames, 27 Mo. 98; St. Louis University v. McCune, 28 Mo. 481, affirmed.) Query, before survey, how can the proper location of lines be determined?—*Id.*
3. *Schools.*—A confirmation under the act of Congress of July 4, 1836, to land within the out-boundary survey of the town of St. Louis, is a title, notwithstanding the reservation to the use of schools under the acts of June 13, 1812, and January 27, 1831, and a mere trespasser cannot defend against it.—Papin v. Ryan, 21.
4. *Survey.*—Until the lands reserved for schools by the act of 1812, and granted by the act of 1831, are designated and set apart by the surveyor general, the grant made by those acts does not attach to any particular land.—*Id.*
5. *State—Title.*—The State of Missouri, by virtue of its sovereignty, does not acquire title to the islands that have formed in the Mississippi river since the admission of the State into the Union.—Adams v. City of St. Louis, 25.
6. *Patent, younger to support an equity against an elder title.*—It having been decided in the case of Kissell v. St. Louis Public Schools, 16 Mo. 553, and 18 How. R. 19, that the entry of Robert Duncan as preemptor of fractional section 26, township 45 north, range 7 east of the 5th principal meridian, under which the plaintiff claims the land in suit, was void; he shows no title, either in law or equity, upon which he can impeach the defendant's title under the acts of 1812 and 1831. (See Magwire v. Tyler, 30 Mo. 202, and 25 How.)—Evans v. St. Louis Public Schools, 27.
7. *Confirmation.*—Acts 1812 & 1816. A confirmation by virtue of the first section of the act of Congress of June 13, 1812, is a better title than a confirmation under the act of April 29, 1816.—Barry v. Blumenthal, 29.
8. *Survey.*—The private claims within the village of Carondelet, although included within the survey, must be understood to be excepted from the confirmation of commons to the town, and it was properly left to the jury to find whether the premises sued for had been used by the inhabitants as a part of the common of the village.—*Id.*
9. *Confirmation.*—A confirmation by the board of commissioners under the act of Congress of March 3d, 1807, is a better title than a confirmation by virtue of the 1st section of the act of June 13, 1812.—Hogan v. Page, 68.
10. *Enurement.*—Hogan v. Page, 22 Mo. 55, affirmed. When the board of com-

LAND AND LAND TITLES—*Continued.*

missioners, under the act of Congress of March 3d, 1807, issued a certificate of confirmation to the legal representatives of the grantee under the French Government, and not to the party who presented the claim, the certificate does not enure to the benefit of the claimant unless he prove himself to be the assignee or legal representative of the person in whose name the certificate issued.—*Id.*

11. *Wife's Estate in Lands.*—The husband cannot, in this State, by his deed, alien the estate of his wife in lands without her consent.—Boyle v. Chambers, 46.

12. *Paraphernalia.*—The husband could not, by the Spanish law, alienate the wife's paraphernal property without her consent.—*Id.*

13. *Wife's Estate.*—Where the legal title in a leasehold estate in lands was vested in a trustee for the benefit of the wife, the death of the wife will not prevent the trustee from recovering the possession of the property in ejectment. The legal title remains in the trustee.—Slevin v. Brown, 176.

14. *Mechanic's Lien—Title.*—Parties interested in property subject to a mechanic's lien, who are not made parties to the suit to enforce the lien, may, in a suit upon the title under the lien, object to the regularity of the proceedings.—Hauser v. Hoffman, 334.

15. *Mechanics' Liens—Limitation.*—The act of February 14, 1857, relating to mechanics' liens in St. Louis county (Acts 1856–7, p. 668), requiring suits upon liens to be commenced within ninety days after the filing of the lien, applied to liens previously filed under the law of 1855 (R. C. 1855, p. 1064), so as to require suits to be commenced within ninety days after the passage of that act. The plaintiff not having sued upon the lien within ninety days, acquired no title, under the sheriff's sale, upon the lien and judgment, as against parties interested in the land, not parties to the suit to enforce the lien.—*Id.*

16. *Limitations.*—The act limiting actions for the recovery of real estate, of February 24, 1847, and the same act, R. C. 1855, p. 1045, does not include the limitation of suits for dower.—Littleton v. Patterson, 357.

17. *Tax Sale—Deeds.*—Where the statute required that the sale of lands for taxes should be made before the courthouse door of the county, and the sale was made inside the courthouse, the sale was void and no title passed by the sale and the register's deed thereupon. (Revenue, R. C. 1845, p. 949.)—Rubey v. Huntsman, 501.

18. *Levy—Execution Sale.*—When a tract of land has been laid out into blocks and lots, with streets and alleys dedicated to the public use, and some of the lots have been sold to third parties, an attachment subsequently levied upon the tract, by its description before subdivision, will be a nullity; and an execution sale, under the judgment in the attachment suit, will not convey the title.—Henry v. Mitchell, 512.

19. *Levy—Description—Deed.*—The sheriff's return of the levy of an attachment upon land of the defendant should describe the land with as much certainty as a sheriff's deed.—*Id.*

20. *Swamp Lands—Tender of Deed.*—By the fourth section of the act concerning swamp lands (Acts 1850–1, p. 239), the county is not required to tender a deed before demanding or suing the purchaser of such lands for the amount due upon his purchase.—Andrew Co. v. Craig, 528.

LIMITATIONS.

1. *Confirmations.*—The statute of limitations in favor of an adverse possession of a field lot confirmed by the second section of the act of Congress of April 29, 1816, commences to run from the time of possession taken and before a survey of the claim by the United States. (Aubuchon v. Ames, 27 Mo. 98; St. Louis University v. McCune, 28 Mo. 481, affirmed.) Query, before survey, how can the proper location of lines be determined?—McCune v. O'Fallon, 13.
2. *Mechanics' Liens.*—The act of February 14, 1857, relating to mechanics' liens in St. Louis county (Acts 1856-7, p. 668), requiring suits upon liens to be commenced within ninety days after the filing of the lien, applies to liens previously filed under the law of 1855 (R. C. 1855, p. 1064), so as to require suits to be commenced within ninety days after the passage of that act. The plaintiff not having sued upon the lien within ninety days, acquired no title, under the sheriff's sale, upon the lien and judgment, as against parties interested in the land, not parties to the suit to enforce the lien.—Hauser v. Hoffman, 334.
3. *Prescription—Confirmation by Act of* 1816.—Aubuchon v. Ames, 27 Mo. 89; St. Louis University v. McCune, 28 Mo. 481, and McCune v. O'Fallon, 32 Mo., affirmed.—Barry v. Blumenthal, 29.
4. *Adverse Possession.*—In an action by a purchaser under a judgment, execution and sheriff's sale, against defendants in possession under a deed from the judgment debtor, alleged to be fraudulent as against creditors, the statute commences to run from the date of the possession taken under the fraudulent deed.—Walker v. Bacon, 144.
5. *Disability.*—Where the statute of limitations has run against a claim to land by tenants in common, if they join in the action, the disability of one tenant will not avail his co-tenant, but both will be barred. (Keeton's heirs v. Keeton's administrator, 20 Mo. 530-544, affirmed.) See note at end of the case.—*Id.*
6. *Possession, adverse.*—The possession by a defendant, who has, by deeds and partitions, acknowledged the title of the plaintiff, cannot be considered adverse to such title.—Tomlinson v. Lynch, 160.
7. *Dower.*—The act limiting actions for the recovery of real estate, of February 24, 1847, and the same act, R. C. 1855, p. 1045, do not include the limitation of suits for dower.—Littleton v. Patterson, 357.
8. *Sheriff.*—An action against a sheriff upon a liability incurred by the doing of an official act, or by the omission of an official duty, is barred by failure to prosecute within three years. (R. C. 1855, p. 1048, § 4.)—Mitchell v. Fulbright, 551.
9. *Possession, extent of.*—Where a party enters into the possession of land claiming title by deed, his possession by law will be co-extensive with the boundaries stated in his deed.—Johnson v. Prewitt, 553.
10. *Possession, adverse.*—The possession of land which bars the legal title must be a hostile possession.—*Id.*

M

MECHANICS' LIENS.

1. *Description.*—For the purpose of enforcing a mechanic's lien, the real es-

MECHANICS' LIENS—*Continued.*

tate upon which the buildings are erected must be described with such certainty as to identify it.—Matlack v. Lare, 262.

2. *Parties.—Title.*—Parties interested in property subject to mechanic's lien, who are not made parties to the suit to enforce the lien, may, in a suit upon the title under the lien, object to the regularity of the proceedings.—Hauser v. Hoffman, 334.

3. *Limitations.*—The act of February 14, 1857, relating to mechanics' liens in St. Louis county (Act 1856-7, p. 668), requiring suits upon liens to be commenced within ninety days after the filing of the lien, applied to liens previously filed under the law of 1855 (R. C. 1855, p. 1064), so as to require suits to be commenced within ninety days after the passage of that act. The plaintiff not having sued upon the lien within ninety days, acquired no title, under the sheriff's sale, upon the lien and judgment, as against parties interested in the land, not parties to the suit to enforce the lien.—*Id.*

MORTGAGES AND DEEDS OF TRUST.

1. *Estoppel in pais.*—Where the party beneficially interested in lands sold under a deed of trust to secure a debt, the sale of which was voidable because the lands were put up in a lump, subsequently induces a third party to purchase the lands from the vendee at the trustee's sale, he cannot afterward be allowed to attack the validity of the sale.—Taylor's Heirs v. Elliott, 172.

2. *Maturing of Debt.*—Where the defendant had become security upon notes given in consideration of lands sold to the principal, and the principal subsequently executed a deed of trust to secure payment of the same notes, which deed contained a proviso that in case of default for thirty days in the payment of any one of the notes, all the notes should become due and payable, and that the trustees might proceed to sell the lands and pay all of said notes, whether due on their face or not; *held*, 1. That by the terms of the deed the notes became due only so far as to authorize a payment from the proceeds of sale, and that no suit could be prosecuted upon them until they matured.—Morgan v. Martien, 438.

O

OFFICERS.

See CONSTABLE. EXECUTION. SHERIFF.

1. *Possession.*—When a constable of St. Louis county had levied upon a slave by virtue of executions from a justice of the peace, and upon a claim of property made by a claimant had taken a bond of indemnity from the plaintiffs in the executions, in accordance with the statute, and had placed the slave in the possession of defendant as bailee; *held*, that the possession of the bailee was that of the constable; and that an action for the delivery of the slave could not be maintained against the bailee.—Hambleton v. Lynch, 259.

2. *Coroner.*—The object of a coroner's inquest is to ascertain the cause of the death. The authority of the coroner, in this branch of his office, is necessarily judicial in its character. Being the sole judge as to the propriety or

OFFICERS—*Continued.*

necessity of holding the inquest, his action in that respect is not subject to revision by the county commissioners; and he is entitled to fees under the statute notwithstanding the verdict of the coroner's jury discloses that the deceased died of a natural death, and not by casualty or violence.—Boisliniere v. Board of County Commissioners, 375.

3. *Constable—Jurisdiction.*—The County Court has no power to vacate the office of a constable, nor any general power to do such acts as shall cause his office to become vacant. Neither has it power, by virtue of the statute relating to constables, (R. C. 1855, p. 346, § 3,) to require the constable to give a new bond, because the penalty in the bond previously given was, in the estimation of the court, insufficient. Where, therefore, the County Court, without a notice to show cause, made an order requiring the constable to give a new bond with a larger penalty than his original bond, and subsequently declared his office vacant upon his failure so to do, and a new constable was appointed by the justice of the township, who gave bond; *held*, that the acts of the County Court were void, and that the securities upon the original bond were liable for moneys collected by the constable upon executions after such acts. Although the court, at a subsequent term, revoked its order, and the constable gave an additional bond, the original bond was not discharged by virtue of 4th section of the statute.—Sheeley v. Wiggs, 398.

P

PARTNERSHIP.

1. *Contract.*—A partnership contract which would be good without a seal will still be valid as a simple contract, although the partner who executed the instrument had no special authority to put the partnership name to such paper.—Human v. Cuniffe, 316.

PAYMENT.

1. *Application.*—A banker is not required by law to apply a balance due by him on account current to his depositor to the payment of a liability from his customer to himself upon a bill or note. In a suit by the banker against the acceptor of a bill, the fact that the drawer had an account with the banker, and that after protest of the bill there were balances in favor of the drawer, would not be evidence in favor of the acceptor to show a payment or satisfaction by the drawer.—Citizens' Bank, &c., v. Carson, 191.

2. *Application.*—Where the collector of the revenue, in his settlement with the County Court, had settled his account, as made out by the county clerk, without objection, he admits that the payments have been properly applied, and his securities will be bound thereby. (S. C., 26 Mo. 226.)—State, use of Buchanan Co., v. Smith, 524.

PRINCIPAL AND AGENT.

1. *Boats and Vessels—Power of Master.*—The master of a boat in the home port has no authority as master to give bond and procure security for the discharge of the boat under the 14th section of the act relating to boats and vessels, (R. C. 1855, p. 307,) so as to bind the owners to reimburse the security for such sums as he may be compelled to pay. He is not the agent

PRINCIPAL AND AGENT—*Continued.*

of the owners for such a purpose, and they will not be liable unless they recognize or ratify his acts in some manner.—Carr v. Burke, 233.

2. *Boats—Power of Master.*—The master of a steamboat may, in the home port, in his capacity of agent, employ persons to serve on the boat, and contract for the necessary stores and supplies.—*Id.*

3. *Note.*—Where an agent executed a note in the name of his principal, the principal will be bound if the agent had authority to give such note, or the principal afterward ratified his act.—Human v. Cuniffe, 316.

4. *Evidence.*—Where an agent was appointed to receive for a special purpose and pay out moneys as he should be directed by his principal, evidence that he had received money which he refused to pay to his principal when demanded was erroneously excluded from the consideration of the jury.—Henry County v. Allen, 486.

POSSESSION.

1. *Officer.*—When a constable of St. Louis county had levied upon a slave by virtue of executions from a justice of the peace, and upon a claim of property made by a claimant had taken a bond of indemnity from the plaintiffs in the executions, in accordance with the statute, and had placed the slave in the possession of defendant as bailee; *held*, that the possession of the bailee was that of the constable; and that an action for the delivery of the slave could not be maintained against the bailee.—Hambleton v. Lynch, 259.

2. *Adverse.*—The possession by a defendant, who has, by deeds and partitions, acknowledged the title of the plaintiff, cannot be considered adverse to such title.—Tomlinson v. Lynch, 160.

3. *Guardian and Ward.*—The possession of the goods and chattels of the ward by the guardian, is the possession of the ward. He acts in a merely fiduciary capacity, and is the agent of the ward in all matters relating to the trust property.—Sallee v. Arnold, 532.

4. *Husband and Wife.*—Where a female ward marries, the marital rights of the husband attach to the goods and chattels of the ward in the possession of the guardian, and he may demand and recover the same although the wife die before he obtain the actual possession.—Sallee v. Arnold, 532.

5. *Bailment.*—If the guardian hire out the slaves of the ward, the possession of the bailee is, as between guardian and ward, the possession of the guardian.—*Id.*

6. *Possession adverse.*.—The possession of land which bars the legal title must be a hostile possession.—Johnson v. Prewitt, 553.

POWERS.

See CONVEYANCES, 2, 3, 4.

PRACTICE, CRIMINAL.

1. *Indictment—Bribing witness.*—In an indictment, under Sec. 9, Art. V., Ch. 50, R. C. 1855, p. 601, it is not necessary to state that the testimony of the witness was material, nor that he had been summoned as a witness. Nor is it necessary to charge that the attempted bribery was with intent to impede and obstruct the due course of justice. Nor is it necessary to state the kind or amount of money or property offered to the witness. Nor is it necessary to state the intent of defendant. And when the attempt was made to induce

PRACTICE, CRIMINAL—*Continued.*

a witness to absent himself, so as to prevent his giving testimony before a justice of the peace in a criminal proceeding, it will be sufficient to allege that the justice had jurisdiction of the matter heard before him.—State v. Biebusch, 276.

2. *Disturbance of Worship.*—To constitute the offence of disturbing religious worship, under the act, R. C. 1855, p. 630, § 30, it must appear that the acts charged as constituting the offence took place when the congregation were assembled for worship.—State v. Edwards, 548.
3. *Indictment—Larceny.*—The stealing of several articles of property at the same time and place constitutes but one offence, and should be so charged. —State v. Daniels, 558.
4. *Indictment—Larceny.*—The stealing of a horse, mare, or gelding, is made grand larceny by the statute, and it is therefore unnecessary to charge the value of the property in the indictment. (R. C. 1855, p. 575, § 25.)—*Id.*
5. *Indictments.*—An indictment which charges the defendant with an indecent exposure of his person on the public highway, but omits to charge that the act was open and notorious, although not good under sec. 8, art. 8, of the Act of Crimes and Punishments, (R. C. 1855, p. 624,) is yet good as an indictment for a misdemeanor at common law.—State v. Rose, 560.
6. *Indictment—Jeofails.*—A mistake in an indictment, which stated that the defendant, with a knife, did feloniously assault and wound one Dunlop, by means of which wounding the life of the said *Craighead* was then and there endangered, &c., is cured by the 27th sec. of art. 4 of Act of Practice in Criminal Cases, R. C. 1176, the mistake being merely clerical, and in no way tending to prejudice the substantial rights of the defendant.—State v. Craighead, 561.
7. *Indictment.*—An indictment under the statute for disturbing religious worship, R. C. 1855, p. 630, § 30, which charges the offence in the words of the statute, is sufficient.—State v. Stubblefield, 563.
8. *Indictment.*—When a statute contains provisos and exceptions in distinct clauses, it is not necessary to state in the indictment that the defendant does not come within the exceptions, or to negative the provisos of the act.—State v. Cox, 566.
9. *Indictment—Merchant without License.*—An indictment which charged that the defendant did "sell at a certain store, stand, and place, &c., various articles of goods, wares and merchandise, and drugs and medicines, &c., without having a license or legal authority to sell the same," charges the defendant as dealing as a merchant without a license, and its defects are cured by the provisions of the statute. (R. C. 1176, § 27.)—*Id.*
10. *Notice—Service.*—The authority to enforce a fine for a misdemeanor must be strictly construed. Therefore, where the ordinance required that the party should be served with notice, the notice must be served upon the person of the party to be charged.—City of St. Louis v. Goebel, 295.
11. *Juror—Crimes.*—A juror who has formed or declared an opinion upon the matter in issue is competent to serve, if the opinion was founded only on rumor and did not bias or prejudice his mind. (R. C. 1855, p. 1191, § 14.)—State v. Rose, 346.
12. *Instructions.*—It is the duty of the court to refuse instructions having no

PRACTICE, CRIMINAL—*Continued.*

application to the case as made by the issues and the evidence; and to give plainly expressed instructions to assist the jury in the application of the evidence given.—State v. Rose, 346.

13. *Penalty, reducing.*—The *minimum* penalty affixed by the statute to the larceny of a horse, mare, or gelding, is ten years' imprisonment in the penitentiary, and it was error in the Circuit Court to reduce the punishment assessed by the jury below the *minimum* thus affixed by the statute. (R. C. 1855, p. 1197, § 8.)—State v. Daniels, 558.

PRACTICE, CIVIL.

1. *Disability.*—Where the statute of limitations has run against a claim to land by tenants in common, if they join in the action, the disability of one tenant will not avail his co-tenant, but both will be barred. (Keeton's heirs v. Keeton's Adm'r, 20 Mo. 530-544, affirmed.)—Walker v. Bacon, 144.
2. *Pleading.*—An answer in ejectment which does not deny, admits the possession.—Tomlinson v. Lynch, 160.
3. *Pleading—Note.*—In a suit by the holder against the endorser of a promissory note, the petition must set out the facts which in law make the note negotiable, as that the note contains the words "value received, negotiable and payable without defalcation;" and it is not sufficient to allege that the note was negotiable, which would be a conclusion of law, and not a statement of fact.—Jaccard v. Anderson, 188.
4. *Pleading—Demand and Notice.*—In a suit to make the endorser of a negotiable promissory note liable, the petition must aver demand of payment from maker, refusal and notice to endorser, or the facts which will excuse or be equivalent to it, in order to show the defendant's liability.—*Id.*
5. *Arrest of Judgment.*—Where the petition does not state facts sufficient to constitute a cause of action, the judgment should be arrested.—*Id.*
6. *Pleading—Evidence.*—A defendant cannot make a defence by the evidence upon the trial unless it be presented by the pleadings.—Currier v. Lowe, 203.
7. *Pleading.*—The defence by a garnishee that the assets of a judgment debtor have been transferred by his conviction for crime, and being sentenced to the penitentiary, if a defence at all, cannot be brought forward by a motion to dismiss; it should be presented by plea.—Wise v. Wolff, 209.
8. *Counter-claim.*—The plea of partial failure of consideration of a promissory note does not constitute a counter-claim so as to require a replication.—Carpenter v. Meyers, 213.
9. *Pleading—Parties.*—Where the action concerns the separate property of the wife, she must sue or defend by her next friend, without joining the husband. (R. C. 1855, p. 1218, Practice, Art. II., § 7.)—Claflin v. Van Wagoner, 252.
10. *Pleading—Parties.*—Where it is sought to charge the wife's separate estate with her debts, her trustee is a proper party defendant, so that in case of sale the legal title may be conveyed. (R. C. 1855, p. 1218, § 4.)—*Id.*
11. *Parties.*—Suit is properly brought in the name of the person with whom the contract is made, although the business may have been conducted under an assumed partnership name.—Wallhornfechtel v. Dobyns, 310.
12. *Party—Injunction.*—The State cannot properly be made a party plaintiff, at

PRACTICE, CRIMINAL—*Continued.*

the relation of a private citizen, to a bill of injunction to restrain the County Court of a county from issuing its bonds or levying a tax to pay for a subscription to the stock of a railroad company. The State has no interest, legal or equitable, in the subject matter.—State, to use, v. Parkville and Grand River Railroad Co., 496.

13. *Pleading—condition precedent.*—In declaring on a contract containing stipulations to be performed by the plaintiff precedent to the performance of the agreement of the defendant, the plaintiff must allege the performance of such stipulations or a sufficient excuse for their non-performance.—Easye v. Ambrose, 484.

14. *Pleading—Motion to strike out.*—A motion to strike out part of a pleading, described by reference to line and page, does not sufficiently specify the part referred to, and the Supreme Court will not review the action of the inferior court upon such motion.—Patterson v. Hollister, 478.

15. *Trials.*—All suits upon bonds, bills or notes are, by sec. 26, Art. VI., Practice Act, R. C. 1855, p. 1235, triable at the return term.—Carpenter v. Meyers, 213.

16. *Injunction.*—An injunction will not be granted, at the instance of a tax-payer, to restrain a County Court from levying a tax, upon the ground that the court had no jurisdiction, and that its action was a nullity. It must appear that the injury to the tax-payers would be irreparable, or such as could not be redressed by action at law. (Sayre v. Tompkins, 23 Mo. 443, affirmed.)—State, to use, v. Parkville and Grand River Railroad Co., 496.

17. *Trials—Nonsuit.*—Where the plaintiff needlessly takes a nonsuit, the Supreme Court will not relieve him.—Gentry Co. v. Black, 542.

18. *Evidence.*—Where an instrument sued upon is set forth in the petition and admitted in the answer, it is not error in the court to refuse to allow the instrument to be read as evidence upon the trial.—*Id.*

19. *Discontinuance.*—Leave to discontinue ought generally to be given a plaintiff, but the giving or refusing it is a matter of practice resting in the discretion of the court. It ought never to be given where it would deprive any defendant of a just defence.—Adderton v. Collier, 507.

20. *Error—Continuance.*—To warrant the reversal of a judgment for alleged error in overruling a motion for continuance, the record must present a state of facts showing that the discretion of the court has been unsoundly exercised.—Carpenter v. Meyers, 213.

21. *Depositions.*—Either party to a suit has the right to read in evidence the depositions taken by the opposite party, if offered at the proper time, without giving previous notice of his intention —McClintock v. Curd, 411.

22. *Issues.*—It is the duty of the court to state the issues to the jury, without referring them to the pleadings to ascertain what the issues are.—Dassler v. Wisley, 498.

23. *Instructions.*—It is error to give instructions to the jury which there is no evidence to support.—McClintock v. Curd, 411.

24. *Trials.*—An error of the court in refusing to a party the opening and conclusion of a case to the jury, furnishes no ground for a new trial, unless the party has been materially injured thereby.—Farrell's Adm'r v. Brennan's Adm'x, 328.

PRACTICE, CRIMINAL—*Continued.*

25. *Trials.*—In a suit under the statute to test the validity of a will admitted to probate, the party attacking the will holds the affirmative, and is entitled to open and conclude the case. But the Supreme Court will not reverse the judgment of the court below for refusing to the plaintiff such opening and conclusion, unless it appear that manifest injury has been done to the party thereby. (Farrell's Adm'r v. Brennan's Adm'x, ante, p. 328, approved.)—McClintock v. Curd, 411.

26. *Instruction.*—The Supreme Court will not decide upon the sufficiency of the evidence to warrant an instruction unless all the evidence be preserved in the bill of exceptions.—White, Adm'r, v. Gray, 447.

27. *Issues.*—The jury are properly instructed to disregard all evidence not pertinent to the issues presented by the pleadings.—*Id.*

28. *Appeal—Final Judgment.*—A judgment of the Circuit Court upon an appeal from the County or Probate Court, refusing to approve the report of sale of the real estate made by the administrator, is not a final judgment from which an appeal lies to the Supreme Court. (R. C. 1835, p. 53, § 20.)—Wolff & Speck v. Wohlien, 124.

29. *Judgment.*—Where several are sued at law, and the defence pleaded by one is available to the others, after a verdict and judgment for the defendant pleading, the plaintiff cannot have judgment by default against the other defendants, for the reason that upon the whole record it appears the plaintiff has no right of action.—Adderton v. Collier, 507.

30. *Judgment.*—The action of the court in sustaining a demurrer to a petition is not a final judgment, so that an appeal or writ of error may be prosecuted upon it.—Robinson v. County Court of Morgan Co., 428.

31. *Final Judgment.*—The judgment dissolving an injunction and dismissing the bill of the plaintiff, is not a final judgment from which an appeal lies. Pacific Railroad v. Burger, 578.

32. *New Trial.*—An application for a new trial, on the ground of newly discovered evidence, must show that due diligence has been used.—Barry v. Blumenthal, 29.

33. *Exceptions.*—The bill of exceptions must show the reason for objections to the admission of evidence.—Weston & Plattsburg Railroad Co. v. Cox, 456; Knipper v. Bechtner, 255.

34. *Setting aside Judgments.*—Where there is any irregularity in the proceedings, a court may, on motion, at a subsequent term, set aside the judgment, or do whatever the justice of the case may require; but where the proceedings are regular, however erroneous, the power of the court to interfere ceases with the term.—Harbor v. Pacific Railroad Company, 423.

35. *Error—Jeofails.*—An error in the court in rendering judgment is not cured by the statute of jeofails after the term is passed; it can only be corrected by appeal or writ of error.—*Id.*

36. *Judgment.*—The action of the court in sustaining a demurrer to a petition is not a final judgment, so that an appeal or writ of error may be prosecuted upon it.—Robinson v. Morgan County Court, 428.

37. *Jeofails.*—A defective averment may be cured by verdict; but where an averment necessary to authorize a recovery is entirely omitted in the

PRACTICE, CRIMINAL—*Continued.*

pleadings, the defect is not cured, and the judgment will be arrested.—Frazer v. Roberts, 457.

38. *Appeal, frivolous.*—Judgment affirmed with damages, no defence to the suit appearing.—Owings v. McBride, 221; Clark v. Rogers, 276.

39. *Transcript Filing.*—Judgment affirmed, appellant failing to file transcript.—Laumier v. Steines, 220; Rogers, Adm'r, v. Bailey, 229; Garesché v. Mulloy, 230; Brooks v. Hannibal & St. Joseph Railroad, 455.

40. *Assigning Errors.*—Judgment for failing to assign errors.—Ivory v. Pearson, 230; Bernicker v. Claus, 231; State, to use of Buhr, v. Spaunhorst, 232; Clemens v. Clemens, 456.

SUPREME COURT.

See PRACTICE, CIVIL AND CRIMINAL.

Q

QUO WARRANTO.

1. *Quo Warranto.*—The Supreme Court has jurisdiction of informations in the nature of a *quo warranto;* but the granting leave to file the information at the relation of a private person, depends upon the sound discretion of the court under the circumstances of the case. Where the attorney general files an information *ex officio*, it is not necessary for him to obtain leave of the court. The parties having an ample remedy in the Circuit Court, involving no difficulties, and the Supreme Court being chiefly an appellate tribunal, it refused to allow an information to be filed to inquire into the title of the relator to act as a director of the St. Charles branch of the Southern Bank. (R. C. 1855, p. 1308.)—State v. McIlhany, 379.

R

REVENUE.

1. *Tax Sale—Deeds.*—Where the statute required that the sale of lands for taxes should be made before the courthouse door of the county, and the sale was made inside the courthouse, the sale was void and no title passed by the sale and the register's deed thereupon. (Revenue, R. C. 1845, p. 949.)—Rubey v. Huntsman, 501.

S

SALES.

1. *Fraud.*—When a vendor sells property having a latent defect of which he is aware, but which he fails to disclose to the vendee, knowing that the latter is acting upon the supposition no such defect exists, he is guilty of a fraud, and the fraud may be pleaded as a defence to an action for the price of the property.—Cecil, Adm'r, v. Spurger, 462.

SECURITIES.

See BILLS AND NOTES, 2, 5.

1. *Surety.*—Although the contract into which the security had entered cannot be varied without his assent by any agreement between the creditor and principal debtor, yet, the creditor may properly take additional securities from the principals, not changing the terms of the collateral to the original contract. Where, therefore, the defendant had become security upon notes

SECURITIES—*Continued.*

given in consideration of lands sold to the principal, and the principal subsequently executed a deed of trust to secure payment of the same notes, which deed contained a proviso that in case of default for thirty days in the payment of any one of the notes, all the notes should become due and payable, and that the trustees might proceed to sell the lands and pay all of said notes, whether due on their face or not; *held*, 1. That by the terms of the deed the notes became due only so far as to authorize a payment from the proceeds of sale, and that no suit could be prosecuted upon them until they matured. 2. That the taking of such deed of trust operated to the benefit of the security, and did not change the effect of his contract.—Morgan v. Martien, 438.

SPECIFIC PERFORMANCE.

1. *Mistake—Specific Performance.*—When a contract for the sale of land had been executed by the vendor by his delivery of a deed to the purchaser, in which the grantee was misdescribed by the name of *John*, when his true name was *James*, the vendee was not entitled to bring his action to enforce a specific performance of the contract, but should have filed his petition in equity to correct the mistake in the deed in the description of the grantee. —Colt v. Beaumont, 118.
2. *Mistake.*—A court of equity will reform an instrument which, by reason of a mistake, fails to execute the intention of the parties, as well upon an equitable defence set up in an answer, as in a suit brought directly for that purpose. (Leitensdorfer v. Delphy, 15 Mo. 160, affirmed.)—Hook, Adm'r, v. Craighead, 405.
3. *Notice.*—The clerk of a Circuit Court in which a suit for specific performance of a contract for the sale of land is pending, thereby has notice of the nature of the claim of plaintiff.—Dickerson v. Campbell, 544.

STATUTES.

Administration.—R. C. 1835, p. 63—Wolff v. Wohlien et al., 134. R. C. 1855, p. 1025, § 16—*Id.*

Attachment.—R. C. 1855, p. 238, §1—Ross v. Clark, 296.

Bills of Exchange—Notes.—R. C. 1855, p. 296, § 16—Farris v. Catlett, 469.

Boats and Vessels.—R. C. 1855, p. 307—Carr v, Burke, 233.

Bridges.—R. C. 1845, p. 454—Livingston Co. v. Graves, 479.

Corporations.—Acts 1853, p. 64—City of Independence v. Moore, 392.

Conveyances.—Acts 1804, 1 T. L., p. 47, § 8—Johnson v. Prewitt, 553. R. C. 1855, § 1—Slevin v. Brown, 176.

Crimes.—R. C. 1855, p. 630—Bernard v. Lüpping, 341: *Id.* p. 630, § 30—State v. Edwards et al., 548 : *Id.* p. 575, § 25—State v. Daniels, 558. R. C. 1855, p. 624, § 8—State v. Rose, 560. R. C. 1855, p. 630, § 30—State v. Stubblefield, 563; State v. Edwards, 548. R. C. 1855, p. 575, § 25—State v. Daniels, 538.

Constables.—R. C. 1855, p. 346, § 3—Sheeley v. Wiggs, 398.

Ejectment.—R. C. 1855, p. 695, § 33; Acts 1857, p. 34—Slevin v. Brown, 176.

Execution.—R. C. 1855, p. 964—State, to use of Beazley, v. Blundin, 387; *Id.* p .751, § 67—Mitchell v. Fulbright, 551.

Fees.—Acts, 1860-1, pp. 30 & 31—State, *ex rel.* McDermott, v. Auditor, 222.

STATUTES—*Continued.*

R. C. 1855, p. 756, § 2, and p. 275, § 13—Freeman v. Henry Co., 446; State, use, &c., v. Parkville & Grand River Railroad, 496.

Guardians.—R. C. 1855, p. 820—Frost v. Winston, 489.

Limitations.—R. C. 1855, § 1—McCune v. O'Fallon, 13; Littleton v. Patterson, 357: *Id.* p. 1046, § 5—Johnson v. Prewitt, 553.

Mechanics' Liens.—Acts 1856-7, p. 668, and R. C. 1855, p. 1064—Hauser v. Hoffman, 334; Matlack v. Lare, 262.

Merchants.—State v. Cox, 566.

Inquests.—R. C. 1855, p. 839—Boisliniere v. Board St. Louis Co. Com., 375.

Quo Warranto.—R. C. 1855, p. 1308—State, *ex rel.* Stewart, v. McIlhany, 379.

Practice, Civil.—R. C. 1855, p. 1218, § 4—Claflin v. Van Wagoner, 252: p. 1232, § 12—Tomlinson v. Lynch, 160; Carpenter v. Meyers, 213: p. 1217, Art. II.—Walker v. Bacon, 144; Claflin v. Van Wagoner, 252; Wallhormfechtel v. Dobyns, 310. Art. VI., p. 1231, § 10—Jaccard v. Anderson, 188: p. 1236, § 31—Patterson v. Hollister, 478: p. 1235, § 26—Carpenter v. Meyers, 213: p. 1238, § 44—Gentry Co. v. Black, 542; Adderton v. Collier, 507. Art. X., p. 1259—Carpenter v. Meyers, 213; White, Adm'r, v. Gray, 447; Dassler v. Wisley, 498: p. 1268, § 47; § 27—Weston & Plattsb'g Railroad v. Cox, 465; Knipper v. Bechtner, 255. Art. XII.—Adderton v. Collier, 507; Robinson v. Morgan Co. Court, 428; Pacific Railroad v. Burger, 578; Barry v. Blumenthal, 29; Harbor v. Pacific Railroad, 423; Frazer v. Roberts, 459. Art. XIV. (Supreme Court): R. C. 1855, p. 1298, § 21—Laumeier v. Steines, 220; Rogers, Adm'r, v. Bailey, 229; Garesché v. Mulligan, 230; Brookes v. Hannibal & St. Jo. Railroad, 455. R. C. 1855, p. 1298, § 23—Ivory v. Pearson, 230; Bernicker v. Claus, 231; State, to use, &c., v. Spaunhorst, 232; Clemens v. Clemens, 456.

Practice, Criminal.—R. C. 1855, Art. IV.—State v. Edwards, 548; State v. Daniels, 558: § 27—State v. Craighead, 561; State v. Cox, 566. Art. VI., § 14—State v. Rose, 346: p. 1197, § 8—State v. Daniels, 558. R. C. 1845, (Revenue), p. 949—Rubey v. Huntsman, 501.

Swamp Lands.—Acts 1850-1, p. 239—Andrew Co. v. Craig, 528.

Wills.—R. C. 1855, p. 1565—McClintock v. Curd, 411; Farrell's Adm'r v. Brennan's Adm'x, 328.

Witnesses.—R. C. 1855, p. 1257—Tomlinson v. Lynch, 160; Kleinman v. Boernstein, 311; Parish v. Frampton, 396.

SWAMP LANDS.

See LANDS AND LAND TITLES, 19.

U

USES AND TRUSTS.

1. *Powers—Marriage Settlement.*—In view of marriage, property was conveyed by settlement and contract by the intended wife, to trustees, to hold until marriage to the use of the grantor and her heirs, and from the marriage to the sole and separate use, benefit and disposal of the wife for and during her natural life, free of her husband's control, &c., and to such uses as the said wife might by writing, &c., direct and appoint; and on her death to such uses as she by will might appoint and direct; and if she died

USES AND TRUSTS—*Continued.*

intestate, to the use of the issue of the marriage then living; and in default of such issue, to the use of the heirs of said wife. The deed further provided that all the property might from time to time be successively charged, invested and reinvested indefinitely by the trustees on the request in writing, &c., of the wife. *Held*, that the wife, with the trustees, could, by proper conveyances, pass the fee of the lands settled by the deed, and that she was not confined to the disposal of a life estate only.—Pendleton v. Bell, 100.

2. *Trust.*—R. P. and his children being jointly interested in land with G. P. and his children, the land was sold in partition and purchased by R. P. for the joint benefit of himself and G. P., no money being paid except the costs, of which each paid one half. R. P. gave G. P. a written acknowledgment, as follows: "I do hereby declare that the purchases which I made, &c., were made for the joint account of G. P. and myself on a verbal agreement between him and me—the deeds of sale are to be made by the commissioner to me. If G. P. wishes to have one half of each tract, I shall execute deeds to him to that purpose; otherwise and until then, whenever I shall sell any part of either, I shall account to him for the one half of the nett proceeds." *Held*, that the trust was a trust for the purpose of converting the land into money, and might as well be executed by the executor of R. P. after the death of G. P. and R. P. as by R. P. himself, no request for a conveyance prior to the sale being shown.—Paul v. Fulton and Brotherton, 110.

3. *Powers.*—By a marriage contract dated July 6, 1842, between W. R., the father of A. R., and A. R. with T. A., it was agreed that all property that said W. R. might give or convey to said A. R. or T. A., or to their use, and the rents, issues and profits thereof, should be held and enjoyed in accordance with the terms of the conveyance or instrument of writing settling such property, except as in such contract afterward specially provided. It was further provided by the second article of said contract, that at any time during the marriage the parties to the contract might sell any of the property that might be conveyed by the said W. R. to the said T. A. or A. R., in accordance with the preceding stipulation, except where different provisions should be made by the deed of conveyance, in which case the provisions of the deed should control. The contract provided further, by article 4, that W. R. should purchase and settle upon his daughter A. R., to provide an annual income, productive real estate in the city of St. Louis, to be selected by him, in trust that the income should be paid to the said A. R., or her written order, during her natural life; and in case she should die leaving a child or children surviving her, then the payment to be made to such children until the youngest should attain the age of twenty-one years, at which time the fee should vest in such surviving child or children, &c. But if said A. R. should die without issue, then the absolute estate in said estate should revert to the said W. R. and his heirs. W. R. owning, at the time, a large amount of unproductive real estate, after the marriage, by deed of June 9, 1843, conveyed seven tracts of land in fulfilment of the purposes mentioned in the marriage contract to the said A. R., *to hold* to her sole use for life, and after her death to such of the children of said Ann as should attain

USES AND TRUSTS—*Continued.*

twenty-one years of age, &c. But if the said A. R. died without issue, or issue attaining said age, then the title to revert to said W. R. or his heirs—the limitations prescribed by the deed following generally the stipulations of the contract for the purchase and settlement of income-producing property. Subsequently, W. R. purchased productive real estate, in compliance with the contract, and in satisfaction of the agreement to settle real estate producing income, and settled the same upon his daughter, and she, with her husband, acknowledged that the stipulations of the contract in that respect had been fully complied with. The plaintiffs, as agents for T. A., contracted for the sale of one of the pieces of land conveyed by W. R. to his daughter by their deed of June 9, 1843; and the said T. A. and wife, and the said W. R., joined in a conveyance to the purchaser, who refused to comply with his purchase, alleging that the deed tendered did not pass a good title in fee simple. Upon a suit by the plaintiffs against T. A., to recover the commissions due them for effecting a sale which fell through on account of a defect in the title, *held*, that by virtue of the marriage contract, and the deed of June 9, 1843, that the deed of W. R. and T. and A. A. to the purchaser, was a good and effective deed to pass the fee, and that the sale had not failed from any fault of the defendant.—Kent & Obear v. Allen, 87.

4. *Trustee—Wife's Estate.*—Where the legal title in a leasehold estate in lands was vested in a trustee for the benefit of the wife, the death of the wife will not prevent the trustee from recovering the possession of the property in ejectment. The legal title remains in the trustee.—Slevin v. Brown, 176.

2. *Uses, Statute of.*—The statute of uses does not apply to chattels real. (R. C. 1855, p. 354, § 1.)—Slevin v. Brown, 176.

W

WILLS.

1. *Practice.*—In a suit under the statute to test the validity of a will admitted to probate, the party attacking the will holds the affirmative, and is entitled to open and conclude the case. But the Supreme Court will not reverse the judgment of the court below for refusing to the plaintiff such opening and conclusion, unless it appear that manifest injury has been done to the party thereby.—McClintock v. Curd, 411. S. P. (Farrell's Adm'r v. Brennan's Adm'x, ante, p. 328.)

2. *Sanity of Testator.*—Upon an inquiry as to the sanity of the testator, the proper question to submit to the jury is, "Were his mind and memory sufficiently sound to enable him to know and understand the business in which he was engaged at the time when he executed the will?"—*Id.*

3. *Sanity of Testator.*—Witnesses acquainted with testator may state their opinions as to his sanity, but should not be asked "if they thought his mind sound enough to make a will," as that would involve a question of law for the court to determine, and not the witness.—Farrell's Adm'r v. Brenan's Adm'x, 328.

4. *Fraud.*—Voluntary deeds in the nature of a will made with the intent to deprive a wife of her dower, would be, as to her, fraudulent and void. (S. C. 29 Mo. 350.)—Tucker v. Tucker, 464.

WITNESSES.

1. *Competency.*—The wife of one of the defendants is not a competent witness for the other defendants who have joined in the defence.—Tomlinson v. Lynch, 160.
2. *Competency.*—A maker of a promissory note against whom judgment by default has been taken, is a competent witness for an endorser made co-defendant in the same suit.—Kleinmann v. Boernstein, 311.
3. *Competency—Assignor.*—An assignor of a chose in action is not a competent witness for the assignee to prove facts about the claim which occurred anterior to the assignment. (R. C. 1855, p. 1577, § 3.)—Parish v. Frampton, 396.